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Supreme Court of the United States

OCTOBER TERM, 1941

No. 928

IN THE MATTER

of

ARMAND SCHMOLL, INC.,
Petitioner and Appellant Below,

v.

THE FEDERAL RESERVE BANK OF NEW YORK,
Respondent and Appellee Below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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A reading of the dissenting opinion of Judge Conway (286 N. Y. at 509-525; R. 37-51) discloses the fact that the Respondent's claims have been completely met, and this is confirmed by Respondent's failure to attempt to deal with that opinion and its reasons.

The propositions advanced by Respondent in its Brief may be disposed of as follows:

As to this Court's jurisdiction (Respondent's Brief, pp. 2 and 3):

The record "affirmatively" shows and "the judgment as rendered could not have been given without deciding" ad-

versely Petitioner's rights under the Tariff Act of 1930 and without interpreting that federal statute. Respondent says: "The New York Court of Appeals is the ultimate authority as to what remedies are provided by the constitution and laws of New York State." Respondent is strangely inconsistent for it and the majority in the Court of Appeals insist that the state courts are without power and jurisdiction to remedy an acknowledged statutory violation and wrong solely because of the claimed conclusive decision of this Court in *McClung* v. *Silliman,* declaring as a matter of federal law the lack of jurisdiction of state courts. The interpretation and effect of the federal tariff act and the alleged denial by this Court of any power in the state courts to issue mandamus or other adequate remedy for the admitted violation of statutory duties, are obviously federal questions within this Court's jurisdiction. Jurisdiction follows "* * * a claim of a right or immunity under a statute of the United States." (*St. Louis & I. M. Ry. Co.* v. *Taylor,* 210 U. S. 281, 292, 293.)

Smith v. *Adsit,* 16 Wall. 185, cited at page 3 of Respondent's brief is not in point. It did not appear there that a federal question had been decided adversely to complainant. (See pp. 188, 189.) *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor,* 210 U. S. 281, 291-293, also cited, is flat authority in support of the jurisdiction of this Court in the instant case, this Court there saying:

> "Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court."

A judgment of the highest state court dismissing a complaint for want of jurisdiction is conclusive upon the Federal Supreme Court, on writ of error, *unless the denial of*

a Federal right is involved. (*Dayton Coal & Iron Co.* v. *Cincinnati, N. O. & T. P. R. Co.,* 239 U. S. 446, 450.) Where, however, that decision is expressly rested upon the determination of the Federal question and not upon the inapplicability of the state law, the United States Supreme Court has jurisdiction. *Commonwealth of Virginia* v. *Imperial Coal Sales Co.* (1934), 293 U. S. 15, 16; *St. Louis I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281, 292, 293. In the *Virginia* case Mr. Chief Justice Hughes, writing for the Court, said (p. 16):

> "As the decision was thus expressly rested, not upon the inapplicability of the state law, but upon a determination of the Federal question by which the bar of the Federal Constitution was erected against the levy of the tax, this Court has jurisdiction. (28 U. S. C. 344B; *Henderson* v. *Henderson City,* 173 U. S. 592, 608, 609; *Rogers* v. *Hennepin County,* 240 U. S. 184, 188, 189; *Grayson* v. *Harris,* 267 U. S. 352, 358."

The correctness of the statement, on page 50 of Petitioner's brief, that "This Court should say to the New York Supreme Court that it *must* determine and apply its own remedies", excepted to by Respondent at page 3 of its Brief, is fully borne out by the decision and opinion of this Court in *Second Employers' Liability Cases,* 223 U. S. 1, at pages 55-59.

As to Respondent's "Statement" (Brief, pp. 3 and 4):

A reading of the Petition (R., pp. 5-19) will show that, contrary to Respondent's claim, there are not any or "many conclusions of law and characterizations of Respondent's acts which are included in the petition were not, of course, to be taken as true." The pleaded facts, admitted by Respondent's motion, show the continuous existence of a New York cable buying market, the possession by Respondent at all times of the actual rates and a disregard of its statutory duties by a wilful certification of rates grossly in excess of actual rates to the grave injury of Petitioner.

As to Respondent's "Question Presented" (Brief, p. 4):

Respondent's claim that the duty merely to report actual rates determined by the action of the New York market itself is a "specific governmental function under Section 522(c) of the Tariff Act of 1930," is unsound. (*Matter of Wicksel* v. *Cohen*, 262 N. Y. 446, 449; *Kansas City Southern Ry. Co.* v. *I. C. C.*, 252 U. S. 178, 187; *Continental Tie & Lumber Co.* v. *U. S.*, 286 U. S. 290, 295). This equivocal term "governmental function" cannot be used to convert a statutory ministerial act or duty, not involving the exercise of the political or sovereign power, into a duty protected from, or beyond the remedy of, any court, state or federal, and leave the political and voting power the only one to prevent abuse and violation. *Kendall* v. *United States*, 12 Pet. 524, 610, 614, 618. (Petitioner's Brief, pp. 46, 47, and Petition for Certiorari, pp. 14, 15, 18.)

In harping on the nature of the "governmental function" involved, the Respondent overlooks the essential fact that Section 522(c) also creates rights, enforceable under the common law in state courts, in favor of importers, as well as of the government, which are dependent upon the performance of the prescribed ministerial duty. *Amberg* v. *Kinley*, 214 N. Y. 531; *Schmidt* v. *Merchants Dispatch Transp. Co.*, 270 N. Y. 287, 305-6; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 39. Where Congress creates a right and does not provide a remedy, it intends to leave the right to recover for its violation to be determined by the remedies provided by the state. (*Breisch* v. *Central Ry. of N. J.*, 312 U. S. 484, 486; *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57, 61-62; *Moore* v. *Ches. & Ohio Ry. Co.*, 291 U. S. 205, 214, 215; *St. Louis B. & M. Ry. Co.* v. *Taylor*, 266 U. S. 200, 207-8; *Minn., St. Paul & S. S. M. Ry. Co.* v. *Popplar*, 237 U. S. 369, 372; *Texas & Pac. Ry. Co.* v. *Rigsby, supra; Oneida Community Ltd.* v. *Oneida Game Trap Co.*, 168 App. Div. 769, 774-8.

As to Respondent's "Point I" (Brief, pp. 5-8):

Petitioner does not seek to have a state court direct or control "a governmental function". It seeks only to prevent an injury to Petitioner's vested rights through an open violation of a mandatory, ministerial duty which does not involve a governmental function in the sense of an exercise of discretion or of the political or sovereign power. (*Kendall* case (1838), 12 Pet. 610, 614.) (Petition for Certiorari, pp. 14; Supporting Brief, pp. 44, 45.) The *McClung* case, again urged by Respondent as conclusive, is demonstrably destroyed as authority by the reasoning of Judge Conway in his dissent (286 N. Y. at 514, *et seq.;* R. 42, *et seq.*). Respondent declares: "No case has been cited by the petitioner in any of the courts during any stage of this proceeding which disputed its authority (*McClung* case)." As has been pointed out several cases completely dissipate that claim, i. e., *Northern Pacific Ry. Co. & Walker D. Hines as Director General of Railroads* v. *North Dakota,* 250 U. S. 135, 152; *Claflin* v. *Houseman,* 93 U. S. 130, 137; *Second Employers Liability Cases,* 223 U. S. 1, 57, 58; *Houston* v. *Moore,* 5 Wheat. 1; *Riggs* v. *Johnson County,* 6 Wall. 166.

This Court, following the *Kendall* case, held in *United States* v. *Schurz* (1880), 102 U. S. 378, 393-395, that the Supreme Court of the District of Columbia could compel by mandamus the Secretary of the Treasury, the then head of the Government Land Department, to issue and deliver a land patent to the petitioner, on the ground that all matters involving judgment and discretion had already been passed upon favorably to petitioner by the proper land officers and that only the ministerial act of issuing and delivering the patent, enjoined upon him by law, remained to be done. That case definitely holds that the Supreme Court of the District of Columbia possesses jurisdiction to issue writs of mandamus "in cases in which the parties by the common law are entitled to them", to compel even the head of the

United States Land Department, in connection with his "governmental function" of supervising the Land Department and issuing patents under the Public Land Acts, to perform a *ministerial* statutory duty. Since the *Schurz* case, the heads of the Land Department and land officers have been subject to mandamus in the District of Columbia Courts, to compel them to perform ministerial acts enjoined upon them by the Public Land Laws (*Wilbur* v. *Krushnic,* 280 U. S. 305, 318-319).

Viewed restrospectively from the *Kendall, Schurz, Claflin* and *Northern Pacific* decisions the Ohio court clearly had jurisdiction to issue mandamus to compel the register to make the entry, if the land had not theretofore passed out of the public domain (*Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228 at pages 237-8), as otherwise the act of May 10, 1800 (2 Stat. 73), would have been applicable; and, so, in any event, the Ohio and this Court had jurisdiction to pass upon the merits of McClung's claim.

Respondent's cases are not in point, hold no such rule as claimed and the text books cited merely repeat without analysis of the decision the mistaken and unwarranted headnote of the *McClung* case stating that: "A State Court cannot issue a mandamus to an officer of the United States."

Speaking of the *McClung* case and its citations on page 6 of Respondent's Brief, it is well to remind this Court that expressions in an opinion which are beyond the point involved do not come within the rule of *stare decisis.* (Marshall, Ch. J., in *Cohens* v. *Virginia,* 6 Wheat. 399; *Carroll* v. *Lessee of Carroll,* 16 How. 275, 286-7; *O'Donoghue* v. *U. S.,* 289 U. S. 516, 550; *Humphrey's Ex'r.* v. *U. S.,* 295 U. S. 602, 626-628; Hughes, Ch. J., in *Puerto Rico* v. *Shell Co.,* 302 U. S. 253, 269-270.) Nor is the original *dictum* converted into an authority by later quotation or citation, or misunderstanding of the holding by text book writers.

Respondent's claim rests upon pure assumption that its statutory duties involve a political or sovereign act and "are not ministerial but require the exercise of judgment, discretion and special knowledge", although the prescribed duty is

merely to certify the buying rates made by the New York market itself, with all transactions reported daily to Respondent. Respondent asserts: "With the ever-increasing number of activities of the Federal Government, with the increase of its departments, bureaus and administrative agencies, utter confusion would result if every State court in the land could undertake to mandamus Federal officials in the performance of their duties" (Respondent's Brief, pp. 7, 8). This is of course an unwarranted plea for autocratic and arbitrary power (*Garfield* v. *Goldsby,* 211 U. S. 249, 262), leading to such an unmitigated abuse as is presented by the Petition for mandamus, which remedy alone can prevent the Respondent's continuing unlawful disobedience of the Tariff Act and bring about a performance of its statutory mandatory and ministerial duties. Where concurrent jurisdiction of the state court is held to exist, the state court is barred from declining such jurisdiction on grounds of expediency (*Claflin* v. *Houseman*, 93 U. S. 130, 137; *Second Employers Liability Cases,* 223 U. S. 1, 57-58). It is also within the power of Congress to withdraw such concurrent jurisdiction at any time it sees fit, and respondent is protected from error by the right to the very writ of certiorari that it is now opposing.

As to Respondent's "Point II" (Brief, pp. 8, 9):

Not only is there no exclusive jurisdiction in the Customs Courts but there is no power in them either to bring in Respondent as a party or to render an enforceable judgment against it. (See Petitioner's Petition and Brief, pp. 22-24, 47-49.) Within the rules relative to mandamus and the New York Civil Practice Act, Respondent's unlawful acts cannot "be adequately reviewed by some other court, body or officer".

As to Respondent's "Point III" (Brief, pp. 9, 10):

Respondent states, on page 9 of its Brief, that "They (the Customs Courts) are expressly given jurisdiction to review

the validity of any orders or findings entering into the assessment of customs duties."

Section 522(c) touched at no point the jurisdiction of the Collector or the Customs Courts. It provided merely for the precedent certification of an official conversion rate that the Collector was by statute required to use in assessing and liquidating the duty. This official rate was not a "finding" entering into the Collector's decision, that either he or the Customs Courts had power to review under Section 514. The Collector was not invested with power to make independent decisions where his duty to use the certified conversion rate was mandatory. The Customs Court itself has decided: "The Collector of Customs has no discretion but to comply, and he therefore has made no decision from which an appeal to this Court will lie." (*Nahrgang* v. *United States,* T. D. 47, 134 [vol. 65, No. 26, pp. 23, 28].)

The assertion "that a determination by an executive agency of the rate of exchange entering into a customs assessment is a matter that * * * is nonjusticiable in any court" is unsupported by Respondent's cases. They hold that the decisions of foreign currency values committed to, and made by, our consular agents in their respective foreign countries were not subject to judicial review on collateral attack since the duty of valuation was by statute left to their unfettered judgment and discretion. The doubts, delays and unfairness engendered by that system led to the change made by the enactment of Section 522(c) calling simply for the reporting of the rates determined by the market action itself.

The Respondent's cases cited on page 9 are not in point. In all of them, under the prior acts, the determination of the "value" of the foreign currency was delegated to the unfettered discretion of the consular officers or of the Director of the Mint. No such unfettered delegation of discretion was made by the new Section 522(c).

Section 522(c) appeared first as Section 403 of the Emergency Tariff Act of May 12, 1921 (42 Stat. 17). That Section was substantially in the form of the present Section

522(c). It was intended completely to eliminate all functions involving judgment and discretion existing in the prior acts, under which the *Cramer, Hadden, Klingenberg* and *Amalgamated Textiles* cases were decided, by restricting the inquiry to the New York market rate for cable transfers. This conclusion is confirmed by the Report of the Senate Committee on Finance on Section 403 of the Emergency Tariff Bill (Senate Report No. 16, 67th Cong. 1st Session, p. 16), which stated:

> "The present system requires the ascertainment of the value of foreign currency values thousands of miles away from the port of entry. The proposed amendment would permit the ascertainment of the value of foreign currency in the United States, *at which point it is readily ascertainable with a greater degree of accuracy.* * * *" (Italics supplied.)

Congress intended to eliminate all functions involving judgment and discretion by restricting the inquiry to the New York market buying rate for cable transfers. A "positive and peremptory rule of valuation" was prescribed such as "would enable a court to correct an alleged mistake or miscalculation." (*Hadden* v. *Merritt,* 115 U. S. 25, 28.)

As to Respondent's "Point IV" (Brief, pp. 10-13):

No repetitious, ambiguous talk concerning "governmental function" can prevail against the rights vested in Petitioner by Section 522(c) of the Tariff Act of 1930, or lawfully warrant or authorize the illegal rate certified by Respondent, the use of which, when certified, becomes mandatory upon the customs authorities, resulting in the imposition upon Petitioner of a grossly swollen tariff duty. (Tariff Act of 1930, Section 1; Title 19, U. S. C. A., Section 1001; *Macy* v. *Browne,* 224 Fed. 359, 361, 362, aff'd *sub nom. Waite* v. *Macy,* 246 U. S. 606, 608-610; *Morrison* v. *Work,* 266 U. S. 481, 486-7, and cases cited; *Philadelphia* v. *Stimson,* 223 U. S. 605, 619, 620, and cases cited; *Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228, 236, 238.)

The real issue involved is confused by Respondent's assumption that the duty imposed constitutes a "governmental function", although Respondent's prescribed duty is not such a function (*Kendall* v. *United States,* 12 Peters 524, 610; *United States* v. *Wilbur,* 281 U. S. 206). The statute should not be interpreted "to make its grant illusory" (*Robia Holding Corp.* v. *Walker,* 257 N. Y. 431, 439, by Lehman, C. J.; *Dudley* v. *Mayhew,* 3 N. Y. 9, 15). Relief, of course, may be accorded against the wrongful exercise of governmental power (*Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135; *Claflin* v. *Houseman,* 93 U. S. 130; *Teal* v. *Felton,* 12 How. 284, aff'g 1 N. Y. 537; *Riggs* v. *Johnson County,* 6 Wall. 166; Petition and Petitioner's Brief, pp. 14-18, 23, 40-42, 46). Respondent wholly failed to perform its prescribed statutory duty and, therefore, in so departing from the statute, it ceases to be an agency of the federal government and is entitled to protection only when its act is "within its authority as a Federal instrumentality". The Tariff Act prescribes the "manner of performance" of Respondent's duty and Respondent's open violation of its prescribed duty is not the performance of a federal or governmental function. *Wilbur* v. *Krushnic,* 280 U. S. 305, 318-319. It is the common jurisdiction and duty both of the federal and state courts "to prevent Federal officers or agents from going outside their Federal statutory authority and jurisdiction" (Respondent's Brief, p. 11; *Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152; Petition and Brief of Petitioner, pp. 14, 15, 20, 40-47).

At page 12 of its brief, Respondent states:

> "* * * any order of the State Court directing Respondent *nunc pro tunc* to certify new and different rates for Brazilian milreis on the dates in question and therefore disregarding or annulling the action already taken by Respondent in discharge of its statutory duty, would clearly constitute a direction of the manner of performance of that duty."

This was precisely what this Court ordered done in *Garfield* v. *Goldsby,* 211 U. S. 249, 255, 258, 261, 262, 264, and also was done in *Bates* v. *Supervisors,* 138 N. Y. 95, 115. In *Waite* v. *Macy,* 246 U. S. 606, the injunction against the contemplated violation of the plaintiff's vested rights under the Tea Act was ordered directed to the defendants "individually and as members of the Tea Board," and in the New York case of *Matter of Lewis* v. *Carter,* 220 N. Y. 8, 18, mandamus was directed to the defendants "individually and as the Board of Parole for State Prisons."

Respondent urges (Brief, p. 13) that the federal statutory power given it "to sue and be sued in any courts" gives to New York courts jurisdiction only over the person and not otherwise. "It does not, however, invest such courts with jurisdiction over an action or proceeding against the Federal Reserve Bank of New York involving a *subject matter* which is not within their jurisdiction." This necessarily is an admission by Respondent that there is a federal rule involved and that the denial of a remedy to Petitioner for deprivation of its rights and immunities under the Tariff Act of 1930 because of the claimed withdrawal from the state of any judicial power as against a federal agency, due to the federal constitution and this Court's decision in the *McClung* case, necessarily raises a federal question within this Court's jurisdiction. What this Court, in *F. H. A.* v. *Burr,* 309 U. S. 242, 245, 246, 249, has held to be meant by the authorization by Congress to a federal governmental agency "to sue and be sued" is, that Congress intended to withdraw from its governmental agent any immunity from suit in a state court and to subject it to all state civil process that did not in truth deprive it of power to serve the federal government as it was intended to serve it, or hinder the efficient exercise of its power; and that the burden was on the federal agent clearly to show that such results would flow from being subjected to such state civil process. The Respondent for obvious reasons has not attempted to show this.

As to the Separate "Memorandum for the United States, Amicus Curiae"

The Government's citations (pp. 7-9) and the Respondent's, at pages 6 and 7 of its Brief, do not support their claims that "this Court early held that state courts are without power to mandamus a federal officer". *McClung* v. *Silliman* has been disposed of. In *In re Blake,* 175 U. S. 114, and *Territory* v. *Lockwood,* 3 Wall. 236, the point was not involved and the citation of *McClung* v. *Silliman* was purely *obiter*. *Goldstein* v. *Somervell,* 170 Misc. 602, and *United States* v. *Owlett,* 15 F. Supp. 736, were clear cases of attempted grave interference with the legitimate functioning of a Federal Administrative Agency, which would necessarily impair its ability to function. *Ex parte Shockley,* 17 F. (2d) 133, merely held that a state court had no power or jurisdiction to control by mandamus the official *discretion* of an officer or agent of the United States in the performance of a duty vested in him by a law of the United States, or to order him to perform a duty not vested in him by any law (pp. 136-7). In *Hinkle* v. *Franklin,* 118 W. Va. 5, the West Virginia court evidently followed the erroneous syllabus in *McClung,* that a state court could not control by mandamus an officer of the United States in the performance of his "official" duty, citing also *In re Shockley, supra.* As the "official" act sought to be mandamused in the *Hinkle* case involved discretion and in the *McClung* case involved a *ministerial* act (Section 7, Act of May 10, 1800, 2 Stat. 73; Respondent's Brief, p. 7) we object, not to the *Hinkle* decision, but to the irrelevant citation of *McClung.* While the cited *Shockley* decision that an official act of a federal officer involving discretion could not be controlled by mandamus in a State Court action was partly pertinent, this would be equally true of an action in the Supreme Court of the District of Columbia. The citation is, therefore, not in point to differentiate state from federal courts. *Wilbur* v. *United States,* 281 U. S. 206, 218, 219, lays down the true rule: (1) that mandamus is employed to compel performance of

a ministerial act, this being its chief use, and also to *compel action* in matters involving judgment and discretion, but not to direct the exercise of *judgment or discretion* in a particular way; and (2) that when the duty of the Secretary of the Interior or other executive officer, in the administration of the statutes, is, in a particular situation, so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as so far ministerial that the performance may be compelled by mandamus.

No one of the Respondent's or the Government's cases was, like the instant case, an attempt to require a federal agent to comply with the federal statutory command. They are not in point here where the Petitioner is seeking relief in aid of, rather than interfering with, the federal authority. *Trable's Case,* 13 Wall. 397, is clearly distinguishable. It was not an attempt to compel the federal officer to perform duties imposed on him by a federal statute, but an attempt of a state court by *habeas corpus* to interfere with, and nullify his acting legally within his jurisdiction,—just the opposite to the instant case. *Claflin* v. *Houseman,* 93 U. S. 130, 136-143, with its concurrent jurisdiction successors (Petition, p. 15; Brief, p. 41) completely overrules the *ratio decidendi* of the *Tarble* opinion, which latter was based on the now rejected doctrine of warring sovereignties between the federal and state courts.

The Government seeks to dispose of cases, such as *Riggs* v. *Johnson County,* 6 Wall. 166 (Memorandum, p. 11), on the theory that the so-called Process Acts are statutory authority for "* * * federal courts, in conformity with state practice, to compel state officers to levy taxes to pay federal judgments * * *." It is clear that the federal courts, except in the District of Columbia, have no original jurisdiction in mandamus but the power to issue that writ is purely ancillary, having first otherwise acquired jurisdiction. The Process Acts simply confirm this purely ancillary jurisdiction. However the exercise of this power to issue mandamus as against state officers or agents is wholly dependent upon a grant by the state statute of that remedy.

Thus, whether the mandamus proceeds from original or ancillary jurisdiction makes no difference, for the enforcement of state laws by federal mandamus against state agents, destroys the sole reason for the claimed effect of the *McClung* case, i. e., that the official conduct of an officer or agent of the United States Government "can only be controlled by the power that created him" (R. 28; 6 Wheat. at 605). This exercise by federal courts of mandamus power over state agents necessarily destroys the sole reason given by Johnson, J., in his *McClung* opinion, as well as the Government's claim of the case as an authority (Petitioner's Brief, pp. 46, 47; dissent of Conway, J., 286 N. Y. at 522-3, R. 49, 50). If Congress can invest its District Courts in a State with the State's execution or enforcement processes of a judgment, we fail to see why a State Court, having concurrent jurisdiction of a subject matter with the federal courts, may not also use its statutory process of mandamus to enforce rights of its citizens created under an act of Congress that leaves the remedy to the State Courts, in aid of such Congressional act.

In the very recent case of *Brooks* v. *Dewar,* 313 U. S. 354, 360, 361 (where the Government cited cases, not from the decision of the court, but from the brief of the petitioner, in that case the federal officer), this Court, citing *Cunningham* v. *Macon & Brunswick R. Co.,* (1883) 109 U. S. 446, 451, said, on writ of error to the Nevada Supreme Court, at pp. 359-360:

> "We are not disposed to attempt a critique of the authorities. *Since the jurisdiction and the procedure of the court below* (granting an injunction against the federal officer) *is sustained by decisions of this Court,* we are unwilling to base our judgment upon a resolution of asserted conflict touching issues of so grave consequence, *where, as here, the bill fails to make a case upon the merits.*" (Italics ours.)

As this Court there found that Congress had ratified the acts of the federal officers, it reversed on the merits, but asserted that the state court had jurisdiction.

The Court in *Cunningham* v. *Macon & Brunswick Railroad Company, supra,* to which this Court referred in its opinion, in a review of suits brought against federal officers, divided them into three classes (pp. 452, 453), the third of which classes it described as follows:

> "3. A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process.
>
> "Of this class are writs of mandamus to public officers, as in *Marbury* v. *Madison,* 1 Cranch, 137; *Kendall* v. *Stokes,* 3 How. 87; *United States* v. *Schurtz,* 102 U. S. 378; *United States* v. *Boutwell,* 17 Wall. 604."

This Court there destroyed the entire thesis of the Respondent and the Government that there is an essential difference between mandamus and the remedy of damages for tort against a federal officer unlawfully injurying property of the petitioner under color of authority. (See: Respondent's Brief, p. 11; Government's Brief, pp. 9-10; and much more fully in their briefs below in the New York Court of Appeals). Mr. Justice Miller, writing for this Court, said, at page 456 (of 109 U. S.):

> "In actions at law, of which mandamus is one, where an individual is sued, as for injuries to person or to property, real or personal, *or in regard to a duty which he is personally bound to perform,* the government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant, he must show it to the court and abide the result. * * * It is no answer for the defendant to say I am an officer of the government and acted under its authority, unless he shows the sufficiency of that authority." (Italics Supplied.)

The United States, at page 7 of its Brief, *Amicus Curiae,* says: "* * * the rule of the *McClung* case is not based on the government's immunity from suit but on the principle that the conduct of a federal officer 'can only be controlled by the power that created him.'" Of course, no provision of the Federal Constitution expressly or impliedly grants immunity to a federal agent from state court action based on his unlawful acts under color of authority. This *dictum* of Mr. Justice Johnson in the *McClung* case (which was *obiter* since the court had no appellate jurisdiction of the point involved; Petition, p. 19; Supporting Brief, *Point Third,* pp. 51-55) but which the Respondent and the Government seek to apply as a basic "principle" of constitutional law modifying the conceded concurrent jurisdiction of the Federal and State courts, itself stemmed from the now long-abandoned concept of mandamus as a prerogative writ of the sovereign (*United States* v. *Kendall* (1838), 12 Pet. 524, 620-621; *Hartman* v. *Greenhow,* 102 U. S. 672, 675; *People, ex rel. Solomon* v. *Brotherhood of Painters,* 218 N. Y. 115; Petition, p. 21). Mandamus, or a statutory order of that nature, today "is nothing more than an ordinary proceeding or action in which the performance of a specific duty, by which the rights of the petitioner are affected, is sought to be enforced" (*Hartman* v. *Greenhow, supra,* p. 675). The *dictum* further stems from the earlier legalistic concept of the States and the Federal Government as independent sovereignties with warring jurisdictions, portrayed in *Tarble's Case* and sought to be imposed on this Court in the *Claflin* case, but which this Court there definitely rejected (93 U. S. 130, 137-143). The *Claflin, Bombolis, Taylor* and *Second Employers' Liability* cases (Petition, p. 15; Brief, p. 41) definitely put a quietus on the false assumptions upon which Justice Johnson's *obiter dictum* in the *McClung* case was based.

The *Kendall* case (1838) is quoted from (Respondent's Brief, p. 7; Government's Amicus Memorandum, pp. 8, 9) for the claim that the only issue in the *McClung* case

(1821) was simply the power by a state court to mandamus a federal agent, and that this power was denied. Judge Conway (286 N. Y. at 514, et seq., R. 42, et seq.) demonstrates by his analysis of the *McClung* case that this simply could not be so and that the *Kendall* expression is a mistaken opinion (Petitioner's Brief, pp. 51-53). The quotation is pure *dictum* and its assertion in *Kendall,* of course, does not make it true. Mr. Justice Thompson in the *Kendall* case was evidently misled by the erroneous syllabus and by the expressions of Mr. Justice Johnson in the *McClung* opinion. This Court clearly never had appellate jurisdiction to pass upon the claimed immunity of Silliman, as a federal officer, from the process of the Ohio Court Mr. Justice Johnson admitted this (page 603 of 6 Wheat.), but with his eyes wide open to this Court's lack of appellate jurisdiction of that issue on writ of error, sought to force a general appellate jurisdiction by saying that the court:

> "* * * is not bound to encounter phantoms. * * * And notwithstanding express evidence of the contrary, this court feels itself sanctioned, in referring the decision of the state court, in this case, to the ground on which it ought to have been made, instead of that on which it appears to have been made. The question before an appellate court is, was the judgment correct, not the ground on which the judgment professes to proceed" (6 Wheat. at 603).

This statement may be true of appellate courts with plenary jurisdiction of all issues, but was emphatically not true under the strictly limited jurisdiction of this Court on writ of error under the 25th section of the Judiciary Act (*Crowell* v. *Randell* (1836), 10 Pet. 367, 392, *et seq.*). There Mr. Justice Story, writing for this Court, at page 392, pointed out that the appellate jurisdiction of this court fails unless it appears

> *"that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that (federal) question as indispensable to that judgment."*

And at page 395, Justice Story quoted from the opinion of Chief Justice Marshall in *Hickie* v. *Starke,* 1 Pet. 98:

> "In the construction of that section (the 25th) the court has never required that the treaty or act of congress, *under which the party claims, who brings the final judgment of a state court into review before this court,* should have been pleaded specially or spread on the record. *But it has always been deemed essential to the exercise of jurisdiction in such a case, that the record should show a complete title under the treaty or act of congress, and that the judgment of the court is in violation of that treaty."* (Italics supplied.)

In the *McClung* case the Public Land Acts were not applicable (*Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228, at pages 237-8; Petition, p. 19; Supporting Brief, pp. 53-54) and were not applied, and McClung showed no title or right of entry under them. The stipulated facts made the case identical with *Morrison* v. *Work,* 266 U. S. 481, 486, and *Brooks* v. *Dewar,* 313 U. S. 354, the first of which this court dismissed on the merits, as complainant had no standing to challenge the officer's acts, and the second, as no substantial federal question was necessarily involved.

Under the strictly limited appellate jurisdiction of this Court on writ of error under the 25th section of the Judiciary Act, this Court, on *McClung's* writ of error, had no appellate jurisdiction of the issue of the Register Silliman's immunity from process of the Ohio Court, because the judgment of the court below had been, not adverse to, as the statute required, but in favor of McClung on that issue; and this Court further had no appellate jurisdiction to pass on that issue in behalf of the Register Silliman, because Silliman had not sued out a writ of error, assigning as an error the Ohio Court's rejection of the claimed immunity (*Hickie* v. *Starke,* 1 Pet. 98; *Crowell* v. *Randell,* 10 Pet. 395).

Judge Conway in his dissent (286 N. Y. at 516) demonstrates by his quotation from the *Kendall* case (12 Peters, at 619) that, if M'Clung had been actually decided upon

the ground of lack of jurisdiction in the state court to issue mandamus to a federal officer as such, the judgment below would not have been affirmed by this Court, but would have been dismissed "for lack of jurisdiction":

> "As was aptly said in *Kendall* v. *United States* [12 Pet. (U. S.) at p. 619, referring to *Columbian Ins. Co.* v. *Wheelwright,* 7 Wheat. (U. S.) 524, 534]: 'If the want of jurisdiction in the circuit court had been the ground on which the writ of error was quashed, the same course would have been pursued as was done in the case of *Custiss* v. *Georgetown & Alexandria Turnpike Co.,* 6 Cranch, 233; where the writ of error was quashed on the ground that the court below had not cognizance of the matter.'"

See also: *Miller* v. *Nichols,* 4 Wheat. 311; *Williams* v. *Norris,* 12 Wheat. 117; *Hickie* v. *Starke,* 1 Pet. 98; *Fisher's Lessee* v. *Cockerell,* 5 Pet. 248; *Crowell* v. *Randell,* 10 Pet. 368.

As this Reply disposes of substantially all other points urged by the Government, the Petitioner feels it to be helpful to refer further to only the following:

The Government seeks to overcome the otherwise fatal decision in *North Dakota* v. *Northern Pacific Railway,* 250 U. S. 135, by urging:

> "The state court undoubtedly had jurisdiction to enforce the Director General's alleged duties under state law under the rule of *First National Bank* v. *Missouri,* supra (263 U. S. 640), quite apart from the express provision of Section 10 of the Federal Control Act that 'no defense shall be made * * * upon the ground that the carrier is an instrumentality or agency of the Federal Government'. Jurisdiction was apparently expressly conceded by all the parties in the state courts (see 250 U. S. at 142), and was not controverted in this Court by the appellants. * * *" (Government Memorandum, p. 10, footnote 5.)

This concession that a federal agent, to the extent that he may be burdened with duties under a state law, is sub-

ject to the enforcing jurisdiction of a state court, destroys any claim that the state court is deprived of power to issue mandamus.

The Government's quotation of Section 10 is only partial and any inference that this Court's decision as to jurisdiction is based upon this waiver is dissipated by repeating it in full as follows:

> "* * * Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government."

Quite apart from the issue whether the action was one against the United States, the brief filed in the *North Dakota* case (250 U. S. at 141) as Amicus Curiae by the several States and the National Association of Railway and Utilities Commissioners, called attention to this sentence and especially to the words *"as now provided by law"*, and urged that that provision of the act authorized the remedy of mandamus by a state court, citing and discussing at length, in support thereof, the cases of *Little* v. *Barreme*, 2 Cranch 170, *United States* v. *Lee*, 106 U. S. 196, 220-221, and *Second Employers' Liability Cases*, 223 U. S. 1, 55-59. The *Second Employers' Liability Cases* (1912), following *Claflin* v. *Houseman* (93 U. S. 130, 137, *et seq.*), reaffirmed the doctrine that rights arising under an act of Congress, in the absence of Congressional exclusion, may be enforced as of right in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion; and that state courts cannot refuse to enforce such rights by their common-law or statutory remedies, on the ground of possible inconvenience or confusion.

As jurisdiction can not be created by consent (*Neirbo* v. *Bethlehem Corp.*, 308 U. S. 165, 167), but results from the allegations of the complaint (*United States* v. *Lee*, 166 U. S. 196, 219-20) and of course precedes a determination

on the merits (*Minnesota* v. *Hitchcock,* 202 U. S. 68), it was imperative that this Court, in order to have jurisdiction to reverse on the merits the mandamus issued by the North Dakota Court, should first hold that the North Dakota Court, on the allegations of its complaint, had jurisdiction to issue mandamus to the Director of Railways; otherwise this Court would have had no power to reverse in that case. This Court did so hold, evidently adopting the contentions set out in the brief filed as Amicus Curiae by the several States and following its prior decisions in *Claflin* v. *Houseman* and *Second Employer's Liability Cases.* Mr. Chief Justice White, writing for the Court, said at page 152:

> "The relief afforded against the officer proceeded upon the basis that he was exerting a power not conferred by the statute, to the detriment of the rights and duties of the state authority, and was subject therefore to be restrained by state power within the limits of the statute. Upon the premise upon which it rests, that is, the unlawful acts of the officers, the proposition is undoubted * * *."

Having necessarily found that the state court had such jurisdiction, this Court held that it also had jurisdiction, on writ of error, to construe the act and reverse upon the merits for an erroneous construction of the act. It then reversed and "remanded for further proceedings not inconsistent with this opinion." No inference may, therefore, be drawn that jurisdiction was assumed in the *North Dakota* case because the statute removed the defense of federal instrumentality or agency.

Whatever may have been the holding, on the stipulated facts, in the *McClung* case in 1821, it is clear that this Court some one hundred years later in the *Northern Pacific* case advisedly applied its later fully developed doctrine of the concurrent jurisdiction of State Courts to protect by their local process rights created by Acts of Congress, to cover the issuance of mandamus by a state court to

compel the performance by a federal officer of a federal ministerial duty, upon the performance of which private rights were dependent. Even assuming, *arguendo,* Respondent's claimed holding of the *McClung* case to be correct, such putative holding was definitely rejected and overruled by this Court in the *Northern Pacific* case in 1918, as it had been forty-five years earlier in the *Claflin* case. (*Schmoll* v. *Federal Reserve Bank,* 286 N. Y. 513, dissent of Conway, J., at pp. 518, 519, 521, 522; R. (fol. 53) 45-46, 48-49).

Conclusion

It is respectfully submitted that it has clearly been shown that this Court has jurisdiction to review the decision of the New York Court of Appeals in this case, and that the decision of the Courts below is clearly not in accord with the applicable decisions of this Court; and that the Petitioner's Petition for Certiorari should be allowed and the Writ of Certiorari granted.

Respectfully submitted,

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